Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-9631

GERALD HAY KILGORE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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IN THE

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October Term, 1975

No. .....

GERALD HAY KILGORE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

The Petitioner, Gerald Hay Kilgore, respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on September 2, 1975, and the opinion and judgment of said Court after Petition for Rehearing, denying said Petition for Rehearing, entered on December 12, 1975.

Opinions Below.

The initial opinion below, was rendered by the United States Court of Appeals for the Fifth Circuit, and was filed on September 2, 1975. This opinion is reported at 518 F.2d 496 and is attached hereto as Appendix "A".

Following Petition for Rehearing a second opinion denying said Petition and supplementing the original

opinion, was filed on December 12, 1975. This opinion is reported at 524 F.2d 957 and is attached hereto as Appendix "B".

Jurisdiction.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented for Review.

1. Whether 18 U.S.C. §2518(1)(b)(iv) requires the identification in a wiretap application, and order, of all persons who the Government has probable cause to believe are involved in the suspected illegal activity and whose conversations relating to such activity will be intercepted; and if such identification is required, whether failure by the Government to so identify is grounds for suppression of the seized conversations of such known but unidentified individual.

2. Whether 18 U.S.C. §2518(1)(e) requires a full and complete statement of the facts concerning all previous applications involving any of those same known persons; if such information is provided whether the District Court may properly excise such information from the application in order to avoid inquiry into the legality of those prior wiretaps, and whether the failure to include such information is grounds for suppression.

3. Whether an aggrieved person should be given an evidentiary hearing, upon request therefor, concerning prior wiretaps involving him in order to prove the illegality thereof, and to prove that the current intercepted evidence was derived therefrom within the meaning of 18 U.S.C. §§2515 and 2518(10)(a)(1).

Statutes Involved.

18 U.S.C. §2515, provides in pertinent part,

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and *no evidence derived therefrom* may be received in evidence in any trial, ... (Emphasis added).

18 U.S.C. §2518, provides, in pertinent part,

> (1) Each application for an order authorizing or approving the interception of a wire or oral communication . . . shall include the following information:
>
> . . . .
>
> (b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including . . . (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;
>
> . . . .
>
> (e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application;
>
> . . . .
>
> (4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

. . . .

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, . . . every order and extension thereof . . . must terminate upon the attainment of the authorized objective, ...

(10)(a) Any aggrieved person in any trial, . . . may move to suppress the contents of any intercepted wire or oral communication, *or evidence derived therefrom*, on the grounds that—

(i) the communication was unlawfully intercepted (Emphasis added).

Statement of the Case.

Petitioner and his co-defendant Sam Green, were indicted in Florida for conspiring to violate and for violating 18 U.S.C. §1952, which prohibits the use of interstate commerce for gambling activity. A substantial portion of the evidence in support thereof was the content of telephone conversations between said persons, intercepted by the Government pursuant to a court order authorizing interception of the conversations of Green and others unknown, over Green's telephones in Florida. Those conversations contained exchanges of gambling information between the parties.

The application for such Florida order and the affidavit in support thereof mentioned a prior application in California as against petitioner and contained excerpts from two or three conversations, between petitioner and Green, intercepted under that wiretap, as probable cause to intercept Green's telephones in Florida. Neither that Florida application nor order identified petitioner as a person whose conversations would be intercepted, nor did the application contain any information concerning a prior Georgia application pursuant to which petitioner's conversations were intercepted in that state, nor concerning several other prior applications against petitioner in California.

After entering a plea of not guilty petitioner moved to suppress the wiretap evidence on the ground that the evidence was illegally intercepted and was derived from prior illegal interceptions in that, (1) at the time of the prior Georgia application the Government had probable cause to believe petitioner was involved in the activity under investigation but failed to identify him as a target thereof in either the application or the order, (2) the objective of the Georgia order was attained and petitioner was indicted in Georgia for violations of 18 U.S.C. §1952 upon evidence derived from the wiretap thus, under the provisions of 18 U.S.C. §2518(5) further interception of his conversations for that offense was prohibited, (3) petitioner was not served with an inventory *re* that Georgia application as required by §2518(8)(d), (4) that a series of several applications were then filed in California for orders authorizing further interception of petitioner's conversations to obtain additional evidence of violations of 18 U.S.C. §1952, the probable cause for which was conversations of his intercepted under the Georgia tap, (5) that some, but not all, of those California applications mentioned the Georgia application but none ever advised that sufficient wiretap evi-

dence had already been obtained, pursuant to the Georgia order, to indict him for the very offense being investigated in California, (6) that pursuant to those California applications the Government intercepted some 40 different telephones and intercepted some 800 reels of taped conversations, without any attempt at minimization, the great majority of which were innocent conversations of persons neither named in the orders nor suspected of any crime, (7) that included in those intercepted conversations were many conversations between petitioner and Green, identical to those subsequently intercepted in Florida, and sufficient to indict both of those persons in California for the identical offense for which the Florida application was subsequently filed, (8) at the time of the Florida application the Government had probable cause to believe that petitioner was involved in the suspected activity and that his conversations would be intercepted but failed to identify him as a target thereof in either the application or order, (9) the Florida application made no mention of the prior Georgia application nor of several of the prior California applications, nor did the application advise that sufficient wiretap evidence had already been obtained with which to indict petitioner in Georgia and to indict both petitioner and Green in California, and (10) petitioner was never served with an inventory *re* the Florida application as required by 18 U.S.C. §2518(8)(d).

Prior to the trial in Florida, petitioner requested an evidentiary hearing in connection with the Florida tap and those prior wiretaps in order to prove all of the above and to prove that the interceptions in Florida were derived from those prior illegal taps (Record on Appeal, pp. 1456-1485).

The District Court acknowledged that some question existed about the legality of the California wiretaps. As a cautionary measure, therefore, it struck all references to the California taps from the Florida application and affidavit, ruled that on the basis of the then remaining information sufficient probable cause still existed to support the order authorizing the tap on Green's phones and denied any evidentiary hearing in connection with the prior Georgia tap or the prior California taps. That Court granted an evidentiary hearing limited strictly to the legality of the Florida tap, refusing to allow any evidence concerning the prior taps either on the issue of the illegality of those prior taps or *re* the effect of such illegality on the Florida tap.

During that limited hearing the Government's attorney, who prepared the application, testified that he would have indeed been surprised had the tap not resulted in interception of petitioner's conversations linking him to the crime under investigation but he did not identify petitioner in that application or order because he saw no reason so to do. The only evidence presented on the question of service of inventory on petitioner was a receipt for registered mail showing a mailing on a date unknown, to petitioner at a totally erroneous mailing address, which had been signed for by some person other than petitioner 94 days after termination of the tap. Petitioner denied ever receiving same.

The trial court denied all motions to suppress wiretap evidence and, based upon that evidence, the jury found petitioner and Green guilty of violating, and conspiracy to violate, 18 U.S.C. §1952.

On appeal the Court of Appeals, Fifth Circuit, held that since petitioner failed to show prejudice to him, or bad faith by the Government, in failing to identify him in the Florida application or order his motion to suppress on the ground of non-compliance with §2518(1)(b)(iv) was properly denied; that since he was only "peripherally" involved in the Georgia tap his motion to suppress on that ground was properly denied, and that no information *re* the prior Georgia tap was required under §2518(1)(e) since petitioner was not a "party" to that tap, and that the slight mention of some of the prior California taps, even though excised from the application by the District Court, was sufficient compliance concerning all of those California taps.

That decision fails to discuss the trial court's refusal to allow petitioner an evidentiary hearing *re* those prior taps to prove his contentions with respect thereto and fails to mention the effect of the trial court's order striking that required information from the Florida application for the admitted purpose of depriving petitioner of the right to such evidentiary hearing.

Following petitioner's petition for rehearing pointing out the fact that, due to the refusal of the District Court to allow any evidence concerning the Georgia tap, there was no evidence in the record to support a finding that petitioner was only peripherally involved therein, or not a known "party", thereto, the Court of Appeals rendered its further decision supplementing its initial decision and denying rehearing. In that second decision the Court appears to hold that the trial court's concern about the possibility of illegality in the prior California taps was a sufficient justification

for striking all information concerning same from the Florida application. That decision fails to discuss the fact that inclusion of such information in said application is specifically required by 18 U.S.C. §2518(e). That decision further holds that although an evidentiary hearing on the Florida application was "absolutely necessary given the allegations in petitioner's motion to suppress," since that hearing failed to produce evidence that petitioner was prejudiced by the failure to identify him, nor of bad faith on the part of the Government, and since the District Court's finding that petitioner received an inventory was "not clearly erroneous", an evidentiary hearing on the prior surveillances involving petitioner was not necessary as the legality of prior taps against him were irrelevant to the Florida application, as was the question of whether petitioner was a known target of the Georgia tap, or only peripherally involved.

REASONS FOR GRANTING THE WRIT.

I

The Government Failed to Identify Petitioner Both in the Present Application and in the Prior Georgia Application Although It Had Probable Cause to Believe He Was Committing the Offense and That His Conversations Relating Thereto Would Be Intercepted.

Title 18 U.S.C. §2518(1)(b)(iv) requires that when the Government applies for a wiretap authorization, the "identity of the person, if known, committing the offense and whose communications are to be intercepted" must be disclosed. That statute has been interpreted by this court in *United States v. Kahn,* 415 U.S. 143 (1974). This Court stated, at 415 U.S. 155:

> "We conclude, therefore, that Title III requires the naming of a person in the application or interception order only when the law enforcement authorities have probable cause to believe that the individual is 'committing the offense' for which the wiretap is sought."

The Courts of Appeal in the Fourth, Sixth and D.C. Circuits have held that failure by Government to identify such a known target in its applications requires suppression of that unidentified target's conversations. *United States v. Bernstein,* 509 F.2d 996 (4th Cir., 1975), cert. pending, No. 74-1486, filed 5/27/75; *United States v. Donovan,* 513 F.2d 337 (6th Cir., 1975), cert. pending, No. 75-212, filed 8/8/75; *United States v. Moore,* 513 F.2d 485 (D.C. Cir., 1975) petition for rehearing *en banc* pending.

In *United States v. Bernstein, supra,* the Court held in dealing with this section of Title III:

> "We conclude from the unequivocal language of Title III that Congress intended any unlawful invasion of an aggrieved person's privacy to be sufficient harm in itself to require suppression. 'Prejudice is not an element of the definition' [of an aggrieved person]." 509 F.2d at 1004.

The Court in *United States v. Donovan, supra,* stated:

> "Since Congress has imposed a clear requirement that the identity of the participants must be disclosed 'if known', we are not concerned with the reason that these names were omitted from the application. In our view it makes no difference whether the omission was inadvertent or purposeful. The fact of omission is sufficient to invoke suppression." 513 F.2d at 341.

A three-judge panel of the Court of Appeals for the Fifth Circuit, with one judge dissenting, has departed from those decisions of the Fourth, Sixth and D.C. Circuits, and held that suppression of conversations of the unidentified but known target is required only if such unidentified target can show prejudice from the failure of identification, bad faith on the part of the Government in failing to comply with the statute or that he was not served with an inventory of the surveillance prior to the trial. *United States v. Doolittle,* 507 F.2d 1368, which decision was affirmed, *en banc,* with six judges dissenting. *United States v. Doolittle,* 518 F.2d 500, cert. pending, No. 75-513, filed 10/2/75.

In the instant case, in its opinion denying rehearing the Court sanctioned the District Court's refusal to

allow evidence of prior taps against petitioner, in order to show such prejudice or bad faith, and stated:

> "Thus, constrained as we are to follow the law of this circuit, KILGORE must show that he is not within *Doolittle* before we would be able to grant him relief." 524 F.2d 957.

The decisions rendered by the United States Court of Appeals for the Fifth Circuit in this case and in *United States v. Doolittle, supra,* are in direct conflict with the above-mentioned decisions in the Fourth, Sixth and D.C. Circuits. Petitioner contends that review by this Court is presently necessary to resolve that established conflict among the Circuits.

II

In This Application the Government Failed to Advise Re Prior Wiretaps Against the Same Individuals and What Little Information Was Supplied Was Stricken From the Application by the Court in Order to Avoid Evidentiary Hearings in Connection Therewith.

18 U.S.C. §2518(e) mandates that a full and complete statement of the facts concerning prior applications, against the same persons, be included in each application for wiretap orders. In *United States v. Giordano,* 416 U.S. 505, this Court stated, at page 514:

> "Judicial wiretap orders must be preceded by applications containing prescribed information, 2518 (1)."

In *United States v. Bellosi,* 501 F.2d 833 (1974) the D.C. Circuit held, at page 837:

> "The application required to be submitted is to include a complete statement of the 'facts and circumstances relied upon by the applicant' to justify his belief that the interception is warranted by law enforcement needs and a full statement as to whether other investigative procedures have been tried and failed or why they appear unlikely to succeed if tried. Section 2518(1)(e) provides that the detailed and particularized information to be submitted must include a full description of previous applications for interceptions involving the same persons, facilities, or places and the action taken by the judge on each such application."

That Court then went on to indicate the various reasons for that requirement and stated, at page 839:

> "A judge fully informed of previous applications involving the same persons, facilities, or places could inquire under section 2518(2) into whether any of these applications resulted in interceptions which were not fully legal and, if so, whether any evidence obtained from the previous interceptions provided the basis for the authorization request presented to him."

It might be added that such fully informed judge might also inquire as to whether those prior taps had resulted in sufficient evidence to prosecute the suspect for the crime being investigated, thus rendering the proposed tap unnecessary.

In the instant case the application completely failed to mention one prior Georgia tap and several prior

California taps against petitioner. The application did briefly mention one prior California tap and an extension thereof, and contained excerpts from two or three conversations intercepted under that tap.

Not only did the District Court refuse to suppress because of those omissions, it actually recognized the possibility of illegality in those prior taps and in order to *prevent* inquiry into that possible illegality struck from the application such of the required information that was included. It would seem that by so doing the District Court not only sanctioned violations of 18 U.S.C. §2518(1)(e) but actually contributed to that violation in order to frustrate the legislative purpose as set forth in *Bellosi, supra.*

Had petitioner been allowed an evidentiary hearing in connection with the prior Georgia and California taps it was his contention that he could prove that he was a known but unidentified target in Georgia, which tap produced sufficient evidence to indict him for the very offenses being investigated under all of the subsequent taps. After the objective of the Georgia tap was achieved the original application was filed in California identifying him as the only known target and requesting wiretapping to prove the same offenses for which he was indicted in Georgia. The California court was not advised of the fact that the California tap was unnecessary to prove such violation and pursuant thereto the Government obtained additional evidence sufficient to indict both petitioner and Green for those same offenses. At the time of the extension of the California tap the Government knew that such extension would intercept Green's conversations concerning the same offenses but in that application for

extension failed to identify Green as a known target nor to advise of the abundance of evidence already obtained, by wiretapping, against both Green and petitioner. While that extended interception was in progress several other applications were filed against petitioner in California and the instant application was filed in Florida, based upon conversations intercepted in California. The Florida application identified Green as the only known suspect, in spite of the fact that the Government knew it would intercept petitioner's conversations, failed completely to advise regarding the prior Georgia tap and several of the prior California taps. By the time the Florida application was filed the Government had obtained sufficient evidence pursuant to the California taps to indict both Green and petitioner for the very offense for which the Florida application was filed. All of the Green-Kilgore conversations used in the Florida trial had been intercepted in California, under the Kilgore tap, and simultaneously in Florida under the Green tap. Petitioner received no notice whatever of that series of wiretaps against him, or of any one of them, until after all were completed and he was arrested, some three and a half months after the initial Georgia tap was terminated.

This Court, in *United States v. Giordano,* 416 U.S. 505 (1974), held, at page 360;

> "The words 'unlawfully intercepted' are themselves not limited to constitutional violations, and we think Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the Congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device."

The instant decisions of the United States Court of Appeals for the Fifth Circuit are in direct conflict with the decision of the D.C. Circuit in *Bellosi, supra.* Whether the District Court may properly excise information from an application, which information is specifically required by the statute to be contained therein, for the sole purpose of preventing inquiry into the legality of prior taps against the same individuals is an extremely important question of federal law which has not been, but should be, settled by this Court.

III

Petitioner Was Wrongfully Deprived of Evidentiary Hearings and Opportunity to Show the Illegality of Electronic Surveillances as Against Him.

This Court, in *Nardoni v. United States,* 308 U.S. 338, 341, held:

> "The trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree."

In *Alderman v. United States,* 394 U.S. 165, this Court noted that the superiority of adversary proceedings for attaining justice in a given case is nowhere more evident than in cases such as this, where an issue must be decided on the basis of a large volume of factual materials, and after consideration of the many and subtle interrelationships which may exist among the facts reflected by those records. The Court further determined that the defendants were entitled to such a hearing in connection with prior electronic surveillances, whether or not the evidence therefrom

had been used in the trial, in order to ascertain whether said surveillance was illegal and if so whether evidence actually used in the trial had been tainted by such illegal interception. At page 176 of that decision this Court stated:

> ". . . for the purposes of a hearing to determine whether the Government's evidence is tainted by illegal surveillance, the transcripts or recordings of the overheard conversations of any petitioner or of third persons on his premises must be duly and properly examined in the District Court."

As was pointed out by this Court in *United States v. Giordano, supra,* footnote 17:

> "In relevant part S.Rep. No. 1097, supra, at 96, 106, provides:
>
> 'Section 2515 of the new chapter imposes an evidentiary sanction to compel compliance with the other prohibitions of the chapter . . . the provision must, of course, be read in light of section 2518(10)(a) discussed below, which defines the class entitled to make a motion to suppress. It largely reflects existing law. It applies to suppress evidence directly (*Nardoni v. United States,* 302 U.S. 379 [1937] or indirectly obtained in violation of the chapter. *Nardoni v. United States,* 308 U.S. 338 [1939])'."

Since the statute specifically provides for a motion to suppress on the ground that evidence is derived from prior illegal electronic surveillances, it would seem to be error to deprive such aggrieved person of an opportunity to produce evidence of the illegality of such prior surveillances or to show that the same tainted the evidence introduced at the trial.

Clearly, if a defendant has no right to prove illegality with respect to prior wiretaps then the right to suppress evidence derived from such prior illegal taps (§2518 [10][a]) is rendered meaningless.

The decisions rendered by the United States Court of Appeals for the Fifth Circuit in this case are in direct conflict with this Court's decisions in *Nardoni, supra,* and *Alderman, supra,* in holding that evidentiary hearing on the prior surveillances involving petitioner was not necessary since any illegality in connection therewith was not relevant. Petitioner contends that review by this Court is presently necessary to clarify that point and preserve to an aggrieved person the right to suppress evidence "derived from" illegal wiretaps as provided in 18 U.S.C. §§2518(10)(a) and 2515.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JAMES EDWARD GREEN,

Attorney for Petitioner
Gerald Hay Kilgore.

APPENDIX

APPENDIX "A."

United States of America, Plaintiff-Appellee, Gerald Hay Kilgore and Sam Green. Defendants-Appellants. No. 71-3559.

United States Court of Appeals, Fifth Circuit. Sept. 2, 1975.

Defendants were convicted before the United States District Court for the Southern District of Florida, at Miami, C. Clyde Atkins, J., of conspiring to violate and of violating statute prohibiting use of a facility in interstate commerce for gambling activity, and they appealed. The Court of Appeals, Goldberg, Circuit Judge, held that evidence that the Attorney General himself authorized wiretap application was sufficient, that failure to list codefendant in application as a person whose communications were to be intercepted did not invalidate the wiretap, and that application complied with statute requiring wiretap application to state facts concerning previous applications to intercept communications involving any of same persons.

Affirmed.

James Edward Green, Van Nuys, Cal., for Kilgore.

E. David Rosen, Miami, Fla., for Green.

Robert W. Rust, U.S. Atty., Miami, Fla., Sidney M. Glazer, John J. Robinson, Attys., Dept. of Justice, R. H. Wallace, Appellate Section, Crim. Div., Dept. of Justice, Washington, D.C., for plaintiff-appellee.

Appeals from the United States District Court for the Southern District of Florida.

Before RIVES, GEWIN and GOLDBERG, Circuit Judges.

GOLDBERG, Circuit Judge:

Kilgore and Green were convicted by a jury of conspiring to violate and of violating 18 U.S.C. § 1952, which prohibits the use of a facility in interstate commerce for gambling activity. The evidence was that Kilgore had transmitted information by telephone from California to Green in Florida. Green then transmitted this information to local bookmakers. The evidence was presented at trial in the form of recordings of the conversations which had been intercepted by federal agents. The defendants had moved to suppress these recordings, alleging that there were illegalities committed in the application for the wiretap order and in its execution. After the trial judge struck references to a prior wiretap from both the application and the affidavit, he still found that sufficient probable cause remained in the application and supporting affidavit to uphold the order allowing the wiretap, that the application was sufficient in its other respects and that the wiretap had been carried out legally. On this basis he refused to suppress the evidence gathered through the interception.

Kilgore and Green appeal their conviction, alleging that their trial was illegally infected by the trial judge's refusal to suppress the recordings. We believe that the trial judge made the right decision and therefore affirm the conviction. We will limit our discussion to three issues raised by appellants, since the other points they raise are without merit.

A. *Authorization for the Application for a Wiretap:*

In *United States v. Giordano*, 1974, 416 U.S. 505, 94 S.Ct. 1820, 40 L.Ed.2d 341, and *United States*

v. Chavez, 1974, 416 U.S. 562, 94 S.Ct. 1849, 40 L.Ed.2d 380, the Supreme Court said that *only* the United States Attorney General or an Assistant Attorney General may authorize a federal agent to apply to a judge for a wiretap order in order to comply with 18 U.S.C. § 2516(1), which provides that the Attorney General or an Assistant may give the authorization. A memorandum submitted by the government, allegedly initialled by then Attorney General John Mitchell, indicates compliance with this requirement in the instant case. The memorandum to an Assistant Attorney General reads in part: "Pursuant to the power conferred on me by Section 2516 of Title 18, United States Code, you are hereby specially designated to exercise that power [to authorize an application] for the purpose of authorizing William L. McCulley to make the above-described application." The Government also submitted an affidavit from Sol. Lindenbaum, the Executive Assistant to the former Attorney General, in which he says that Mitchell approved the request to make application for an interception and that the initials on the memorandum are those of Mitchell.

The appellants contend, however, that these pieces of evidence are not enough to show compliance with 18 U.S.C. § 2516(1). They try to distinguish *Chavez* on the ground that Mitchell himself submitted an affidavit there, which indicated that he had approved the application, whereas here we only have an affidavit from his assistant.

[1] But the statute does not require that the Attorney General both actually approve the application *and* provide the courtroom evidence that he gave the approval. Resolution of the evidentiary question which

arises when the identity of the authorizing agent is contested is not covered by statutory guidelines. In the absence of a statutory mandate ordinary rules of evidence apply.

[2] It is clear that under traditional rules of evidence the testimony of Lindenbaum as to the genuineness of Mitchell's initials is sufficient to admit the Mitchell memorandum to prove that the Attorney General authorized the application:

> [I]t is generally held that anyone familiar with the handwriting of a given person may supply authenticating testimony in the form of his opinion that a writing or signature is in the handwriting of that person. Adequate familiarity may be present if the witness has seen the person write, or if he has seen writings *purporting* to be those of the person in question under circumstances indicating their genuineness. Examples of the latter situation include instances where the witness has . . . been present in an office or other place where genuine writings of a particular person in the ordinary course of business would naturally be seen.

McCormick on Evidence § 221 (2 ed. 1973). *See also* Federal Rule of Evidence 901(b)(2); *Paccon, Inc. v. United States,* 1968, 399 F.2d 162, 185 Ct.Cl. 24.

[3] Lindenbaum, by his status as Executive Assistant to the Attorney General, established a prima facie case of familiarity with documents that the Attorney General would have initialled. His reliability was not contested by the appellants. Thus he is competent to prove the fact that Mitchell initialled the authorization. While here the verification came by way of affidavit and not direct testimony, the appellants made no objection to that procedure below.

[4] We therefore believe that the evidence that Mitchell himself authorized the application was sufficient and that the trial judge did not have to suppress the wiretap results on this basis. We note too that the same result has been reached by two other Circuits in which the evidence presented was an authorization purportedly signed by Mitchell together with a verifying affidavit from Lindenbaum. *See United States v. Brick,* 8 Cir. 1974, 502 F.2d 219; *United States v. Martinez,* 6 Cir. 1974, 498 F.2d 464.

B. *Identification of Suspect Parties in the Application:*

Appellants contend that the application to the judge for a wiretap order was deficient in that 18 U.S.C. § 2518(1)(b)(iv) was violated. That section requires that the application supply "the identity of the person, if known, committing the offense and whose communications are to be intercepted," and also says "[e]ach order authorizing or approving the interception of any wire or oral communication shall specify—(a) the identity of the person, if known, whose communications are to be intercepted." In the present case, paragraph 3 of the application reads: "This application seeks authorization to intercept wire communications of Samuel Green and others as yet unknown concerning offenses enumerated in Section 2516 of Title 18, United States Code . . .". The appellants contend that the Government suspected that it would be intercepting communications from Kilgore but only mentioned Green and "others yet unknown".

The question of whether suspected parties aside from those whose communications are sure to be intercepted must be identified has been considered by this Court, sitting en banc. We have decided that the failure to name such an intercepted party would not invalidate the wiretap where the intercepted party was not prejudiced by the failure to be so named. In *United States v. Doolittle*, 5 Cir. 1975, 507 F.2d 1368, aff'd en banc, we said:

> The wiretap authorization referred to "Billy Cecil Doolittle and others as yet unknown." Anderson and Baxter contend that the Government had reasonable cause to believe that their conversations would be intercepted. Relying on certain language in the Supreme Court's opinion in [*United States v. Kahn*, 1974, 415 U.S. 143, 94 S.Ct. 977, 39 L.Ed.2d 225] they argue that, not being "unknown," they should have been named in the authorization. They contend that since they were not named, the wiretap order was illegal as to their conversations. The same argument could be made for Sanders. We reject this argument. The defendants neither allege nor demonstrate any prejudice to them in not being named in the authorization. The Government contends that its agents had personal knowledge, as opposed to information, to support probable cause as to illegal activity only of Doolittle, the co-owner of the Sportsman's Club, the establishment wherein the telephones were located and to which the telephone bills were sent. All defendants received an inventory of the intercepted conversations, were allowed to listen to the tapes and received transcripts

> of the conversations prior to use against them at trial, as if they had been named in the order. Most of the conversations of each defendant were with Doolittle, the person named in the order. There is no indication of bad faith or attempted subterfuge by the Government in its wiretap application. The application and affidavit delineated specifically the information expected to be gathered from the tap. We hold there was substantial compliance with the requirements of the Act, and that the failure to name other defendants does not render the evidence obtained as to them inadmissible under 18 U.S.C.A. § 2518(10)(a).[1]

507 F.2d at 1371-72 (footnote added).

[5] Here, too, defendants were given an inventory of intercepted conversations, could listen to the tapes and were given transcripts of them. In the recorded conversations at issue, Kilgore spoke to Green, who was named in the wiretap order. There is no indication of bad faith by the Government in its application. The Government here may have had probable cause to name Kilgore in the application, but the Government had probable cause as to the unnamed defendants in *Doolittle*—though by information rather than personal knowledge—and yet there we upheld an application which did not mention these other defendants. Finally, the application and the affidavit specifically

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[1]Section 2518(1)(a) is the section which gives standing to a party claiming to be aggrieved to challenge alleged violations on the previous statutory sections, including § 2518(1)(b)(iv).

delineated what information the Government expected to gather from the wiretap. This issue therefore falls squarely in the shadow of the resolution in *Doolittle* and provides no grounds for reversal.

C. *Identification of Previous Wiretaps in the Application:*

[6, 7] Under 18 U.S.C. § 2518(1)(e) the government's application must give "a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application [to intercept] . . . communications involving any of the same persons . . . ". In the present case the application indicated that the Govermment had previously tapped Kilgore's telephones in California and that this interception had produced evidence of conversations between Kilgore and Green. Appellants contend that the application did not sufficiently detail the contents of the California interception and did not mention at all a Georgia interception in which conversations between a third party and Kilgore had been picked up. The short answer to this complaint is that the statute does not require what the appellants say is lacking. The application must give a statement of the facts about all previous applications involving the same parties. Here the statement about the California interception sufficiently detailed the circumstances of that wiretap and disclosed that conversations with Green were overheard. The statute does not require a fully detailed statement about the contents of

the interception although, of course, a judge may require such additional facts before granting an order. There was no statement about the Georgia interception, but that interception only peripherally involved Kilgore. The Georgia application was made in reference to a third party without cause to believe Kilgore would also be overheard. During the course of intercepting that party's communications, agents heard some of his conversations with Kilgore. In the Georgia application the Government did not apply to intercept communications of the same persons—rather it applied to intercept conversations of a third party.

The conviction is therefore affirmed.

Affirmed.

APPENDIX "B".

United States of America, Plaintiff-Appellee, v. Gerald Hay Kilgore and Sam Green, Defendants-Appellants. No. 71-3559.

United States Court of Appeals, Fifth Circuit. Dec. 12, 1975.

Defendants' convictions in the United States District Court for the Southern District of Florida, C. Clyde Atkins, J., were affirmed by the Court of Appeals, 518 F.2d 496, and defendants filed petition for rehearing. The Court of Appeals held that the Government's failure to identify one defendant in an application for electronic surveillance of the other defendant was not done in bad faith and did not prejudice defendant; and that the district court was not clearly erroneous in concluding that defendant received an inventory of the surveillance conducted in time prior to trial.

Petitions denied.

Appeals from the United States District Court for the Southern District of Florida.

On Petitions for Rehearing and Petitions for Rehearing En Banc

(Opinion, Sept. 2, 1975, 5 Cir., 1975, 518 F.2d 496)

Before RIVES, GEWIN and GOLDBERG. Circuit Judges.

PER CURIAM:

[1] Both Kilgore and Green have filed petitions for rehearing, urging this Court to reconsider its affirmance of their convictions. We find nothing in Green's petition that would require a different result, nor does Kilgore's petition disturb our holding that the electronic surveillance of Green's telephone was legal.[1] Kilgore raises several points that merit discussion, however, with regard to the admissibility of the evidence from the Green tap against him.

Two questions are presented here for our reconsideration: whether the district court gave an adequate evidentiary hearing on the question of the Government's alleged bad faith in not naming Kilgore in the Florida application, and whether Kilgore was prejudiced in any way by the Government's failure to name him. Unless

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[1]We would like to make one point clear at the outset. Even if the Government had conducted illegal wiretaps on Kilgore in the past, Green would not be immunized from surveillance. If green could take advantage of Kilgore's past experiences, the Government would effectively be precluded from investigating anyone who had been tapped before. We cannot believe that Congress intended this result. Thus, the greatest relief to which Kilgore would be entitled would be suppression of the evidence from the Green tap.

Kilgore can show either bad faith or prejudice, his claims are foreclosed by our decision in *United States v. Doolittle,* 5 Cir., 518 F.2d 500 (en banc) [decided Sept. 2, 1975], *affirming* 507 F.2d 1368. In *Doolittle,* there was substantial compliance with the inventory provisions of section 2518(9), no demonstrated prejudice to the defendants and no indication of bad faith on the Government's part. Under those circumstances, the fact that the wiretap authorization did not name the defendants, even though they were actually known to the Government, did not require suppression of the evidence gathered in the tap against them.[2] Thus, constrained as we are to follow the law of this Circuit, Kilgore must show that he is not within *Doolittle* before we would be able to grant him relief.

Some additional facts are necessary to place our consideration of Kilgore's allegations in perspective. As our first opinion indicated, the Florida application to tap Green's telephone named only Green and "others yet unknown" in paragraph 3, which listed the persons whom the Government sought to intercept. Paragraph 5 represented that no previous applications had been filed to intercept any of the "known persons" communications—in other words, Green's. However, paragraph 5 went on to reveal that a previous application had been made to tap Kilgore's telephone in California, and that Green had been intercepted pursuant to that authorization. Nowhere did the application mention

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[2]*But see United States v. Donovan,* 6 Cir. 1975, 513 F.2d 337, petition for cert. filed, 44 U.S.L.W. 3164 (U.S. Sept. 30, 1975) (No. 75-212); *United States v. Bernstein,* 4 Cir., 1975, 509 F.2d 996, petition for cert. filed, 43 U.S.L.W. 3637 (U.S. May 27, 1975) (No. 74-1486).

one prior Georgia wiretap and several prior California wiretaps in which Kilgore had been overheard. Kilgore now alleges that the Government's failure to name him in its Florida application for a tap on Green constituted bad faith on its part and operated to his prejudice. According to his allegations, the Government's motive in failing to name him was to avoid the necessity of revealing the prior wiretaps that involved him. Had these taps been disclosed, he argues, the judge who passed on the Florida application would have found it unnecessary as to him, both as an evidence-gathering mechanism and in terms of the statute's minimization directive. Furthermore, Kilgore argues that the prior California wiretap mentioned in the Florida application was illegal and that evidence from this illegal tap tainted the Florida application.

Recognizing the fact that Kilgore's allegations raised serious questions about the Florida tap, the district court ordered an evidentiary hearing on its validity in connection with Kilgore's motion to suppress. He refused to include within the scope of this hearing any consideration of the prior wiretaps on Kilgore. At the hearing, he acknowledged that some question existed about the legality of the California tap. As a cautionary measure, therefore, he struck all references to the California tap that went to the question of probable cause to tap Green. On the basis of the remaining information, he decided that sufficient probable cause still existed to support the tap on Green's telephone.[3] Defendants' challenge to this finding

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[3]*United States v. Giordano,* 1974, 416 U.S. 505, 94 S.Ct. 1820, 40 L.Ed.2d 341, does not disapprove this procedure.

(This footnote is continued on next page)

is without merit. Thus, after the district court's curative action, the Florida application was valid on its face. Unless the Government had procured it in bad faith, or unless Kilgore was prejudiced by the omission of his name, *Doolittle* would support the court's denial of the motion to suppress. The narrow question before us is whether the evidentiary hearing was sufficient to answer these questions, or whether we should remand this case for further proceedings.[4]

[2] 1. *Was the Government in bad faith when it did not name Kilgore?* The first question we must meet is that of the Government's motive in not naming Kilgore in its application. From a reading of the record at the hearing on the motion to suppress, we see that the court did consider this question. The testimony of the Government's attorney who prepared the application frankly reflects his belief that it was unnecessary to name Kilgore for a surveillance whose purpose was primarily to intercept Green. In cross-examination, Kilgore's attorney clearly pointed out the statutory requirement of naming the persons whose communications were to be intercepted. Since the district court decided to deny the motion to suppress, he must have found implicitly that the Government was not

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Giordano holds that a judge may not disregard the results of a tainted original tap when he is considering the validity of an *extension*, since that procedure would be a direct violation of 18 U.S.C. § 2518(1)(f). However, we agree with Justice Powell's characterization of the majority opinion where he states that it casts no doubt on the proposition that the independent source rule is fully applicable to original orders. See 416 U.S. at 517, n. 7, 94 S.Ct. at 1827 n. 7, 40 L.Ed.2d at 378 n. 7.

[4]We note that since the court did not have the benefit of our decision in *Doolittle*, the issues were not framed as precisely as they might have been.

in bad faith when it omitted Kilgore's name. Surely if he had agreed that the Government was deliberately disobeying the statute, he would have delved further into the question.[5] Thus the legality of the Florida application was not tainted by bad faith in failing to name Kilgore, and the first premise of *Doolittle* is satisfied.

[3, 4] 2. *Was Kilgore prejudiced by the absence of his name?* The second prerequisite which must be met before we can apply *Doolittle* to this situation is the lack of prejudice to Kilgore. The question is this: Would the district judge who approved the Florida application have placed any additional limitations on the use of the evidence or on the surveillance conducted if Kilgore's name and the prior wiretaps had been disclosed? We think the answer to this question must be no, regardless of the details of the prior taps involving Kilgore. First, disclosure of Kilgore's name would not have affected the existence of the tap on Green for as the Government stated the tap was necessary for their investigation of Green. Kilgore argues that the Florida tap was not "necessary" for him; however, we think that the necessity requirement of sections 2518(1)(c) and (3)(c) refers to the technique used, which relates in turn to the nature of the crime. His main point, then, is that the statute's requirement that electronic surveillance be minimized was violated. The rationale behind this requirement dictates that

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[5]We note that a question which later found the Fourth and Sixth Circuits on one side and the Fifth on the other—that is, who must be named in an application—cannot be said to be so simple that the Government was in bad faith to adopt one interpretation of the statute over another. Furthermore, we may not disturb a credibility finding such as this unless it is clearly erroneous.

the Government agents conducting the surveillance not listen to conversations that do not relate to the criminal activity that is the focus of the investigation. It also requires minimization of the number of days or weeks of surveillance.[6] Here, the agents literally could not have listened to Green's conversations related to the criminal activity without also listening to Kilgore. Thus, no matter how much the approving judge minimized the surveillance, Kilgore would have been overheard. Additionally, some good faith doubt may have existed with regard to the previous taps on Kilgore which would have caused the judge to approve yet another tap on him. Finally, this was not a case where the tap on Green was just an underhanded way to tap Kilgore: witnesses testified, and the district court found, that Green was the primary target of this tap. We conclude from all the circumstances that Kilgore was not prejudiced by the omission of his name from the Florida application.

[5] *Doolittle* also sets up a third prerequisite to its application: the defendant must receive an inventory of the surveillance conducted prior to the trial. Though some dispute exists on this point, we find that the district court was not clearly erroneous in concluding that Kilgore did receive the inventory in time.

Since we find that the three premises upon which our *Doolittle* holding was based were all satisfied here, the district court was correct in ruling that the evidence

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[6]The legislative history indicates that Congress wanted to insure that the showing of probable cause would not become stale because of governmental delay. *See* S.Rep.No. 1097, 90th Cong., 2d Sess. (1968) (1968 U.S. Code Cong. & Admin. News at p. 2192). In this case, the surveillance lasted only seven days.

from the Green tap could come in against Kilgore despite the fact that Kilgore was not named in the application. Under the circumstances, a separate evidentiary hearing on the prior surveillances involving Kilgore was not necessary.[7]

Except as modified herein, we adhere to our original opinion and deny the petitions for rehearing.

The Petitions for Rehearing are denied and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petitions for Rehearing En Banc are denied.

Denied.

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[7]Our finding that these prior taps on Kilgore were irrelevant to the Green application moots the dispute whether Kilgore was a central figure in the Georgia tap or whether he was only peripherally involved, as we found in our first opinion. Had we found prejudice to Kilgore, a hearing would have been necessary in order to decide whether the evidence from the Green tap should have been suppressed. *See* § 2518(10).

We note that the hearing the court did hold was absolutely necessary, given the allegations in Kilgore's motion to suppress. If he had refused to investigate the legality of the Florida application, we would have been forced to remand this case to him for further consideration.